Petition

81-1720

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1981

No. _____

KATHERINE SAVASTANO, Administratrix of the Estate of William Savastano, Deceased,

Petitioner,

—against—

BOARD OF EDUCATION, Kings Park School District No. 5, County of Suffolk, WILLIAM JOHN BAKER, PHILIP J. BAKER and ST. JOSEPH'S ROMAN CATHOLIC CHURCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

JEFFREY H. JENNINGS
Counsel for Petitioner,
641 Meadow Road
Smithtown, N.Y. 11787
(516) 269-4083

KATHERINE SAVASTANO, Administratrix of the Estate of William Savastano, Deceased,

Petitioner,

—against—

BOARD OF EDUCATION, Kings Park School District No. 5, County of Suffolk, WILLIAM JOHN BAKER, PHILIP J. BAKER and ST. JOSEPH'S ROMAN CATHOLIC CHURCH,

Respondents.

QUESTION PRESENTED:

Constitutional due process and equal protection clauses require the judgment in summary judgment application situation to accord tort balm to widow where there is a cloaked prognosis negative in effecting an improvident compromise of a kindergartner's bus accident action and professional representation at the time was monopolistic under population explosion pressures.

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THE CASE BELOW

Reported references to the case below are: As titled, — N.Y. 2d, — , — N.Y.S.2d — ; 81 App. Div. 2d 1049, N.Y.S.2d.

JURISDICTION:

The date of the judgmental order sought to be reviewed is December 17, 1981 and the 28 U.S.C. 1257(3) provisions allowing application of the Constitutional wording of Article XIV:

> "***nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> Article V: "No person shall be *** deprived of life, liberty or property without due process of law; ***"
>
> in tandem with Article VI: (conferring that a party) "*** shall enjoy the right to *** have the Assistance of Counsel *** "

STATEMENT OF THE CASE

A boy kindergartner was crushed by the wheel of a school bus. A Dr. Frank Child advised the court on its approval of a settlement. Dr. Mary Catherine Tyson, alone here, says that terminality was indicated by Dr. Child's advisings and eventuated. An intervening agony of paralysis and progressive amputations (twenty-one operations) was fraught with economic pressures.

The mistake is evident. A February 8, 1956 brief of attorneys for respondent church stated, "The infant plaintiff in the

instant case is not in danger of death." The mother now informs, "We were under the impression that Billy was assured of his life."

The gravamen of the situation is that an ordinary mistake might not have been made, and the ordinary correction indicated might have been readily made were it not for a local phenomenon of attorney firm "X" setting up in anachronistic anomaly fashion as a branch of the government, j.p.s and cops kowtowing, housing EBTs, representing some 24% of tort litigants, as against the figures of 6% and 4% respectively of top firms in Seattle and Wichita, comparable Western airplane production economy based communities. Population impact and right to counsel are of course part of constitutional due process and equal protection considerations. The specifics of the rise in Long Island's two eastern counties, including Suffolk, from 604,103 persons in 1940 to 2,553,788 in 1970 were noted to the court.

This Constitutional point was raised by the Complaint here in bringing into reference an original complaint in the Eastern District Court spelling out same and illuminated by answer to interrogatories, to affidavit reference on motion, to mid-appellate affidavit on motion, and to further appellate reference in affidavit, notice, the brief's question presented, and an appending of U.S. Supreme Court (Congressional Quarterly's) overview guide material as to the state and the individual.

ARGUMENT

The cases speak to the condition. Protection of infants is plenary. See *Acevedo v. New York*, 15 App. Div. 2d 899, 225 N.Y.S.2d 584. "***But knowing this all-important fact, he failed to mention it to the plaintiff***." found in *LeFrancois v. Hobart College et al.*, 31 N.Y.S. 2d 200, aff'd 262 App. Div. 802. *Krusilla et ano. v. United States*, 287 Fed. 2nd 34 observed that the handling of a "NFFD" (Not Fit For Duty) slip yet was lacking the conveying of that which was necessary to impress upon patient, namely, the seriousness of his condition. The mistake of the injury damages is in a frame of reference of circumstances, child and vehicle, and a leeway allowed as seen by the thrust of the case of *Stein v. Palisi, 308 N.Y. 293.*

How can it be that the Constitutionally supported common law tradition is so sterile as to allow effectiveness to some de facto ombudsman working for plaintiffs in Napoleonic code continentalism fashion? Considerations colored in such fashion are rightly suspect.

CONCLUSION

Judgment for petitioner is required; and certiorari should issue.

March 2, 1982

Respectfully submitted,

JEFFREY H. JENNINGS
Attorney for Petitioner
641 Meadow Road
Smithtown, N.Y. 11787
(516) 269-4083

Appendix

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of December A.D. 1981

PRESENT, Hon. Lawrence H. Cooke, Chief Judge, presiding.

---

2 Mo. No. 1247
Katherine Savastano, administratrix &c.,

Appellant,

vs.

Board of Education, Kings Park School District No. 5, County of Suffolk, et al.,

Respondents,

et al., *Defendants.*

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa
Clerk of the Court

81-1720

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 11, 1981

HON. GUY J. MANGANO, Justice Presiding,
HON. SAMUEL RABIN,
HON. CHARLES MARGETT,
HON. MOSES M. WEINSTEIN. } *Associate Justices*

Katherine Savastano, administratrix etc.,
Appellant,
v.
Board of Education, Kings Park School District No. 5 County of Suffolk, et al.,
Respondents,
et al.,
Defendants.

Order on Appeal from Order

In the above entitled cause, the above named Katherine Savastano, administratrix etc., plaintiff,

having appealed to this court from an order of the Supreme Court, Suffolk County, dated March 25, 1980;

and the said appeal having been argued by Jeffrey H. Jennings, Esq., of counsel for the appellant, and submitted by Thomas A. Palmer, Esq., of counsel for respondent Board of Education and submitted by Seymour H. Metnick, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed, without costs or disbursements. Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

Appendix

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CLERK

In The

Supreme Court of the United States

October Term, 1981
No. 81-1720

KATHERINE SAVASTANO, Administratrix of the Estate of William Savastano, Deceased,

Petitioner,

—against—

BOARD OF EDUCATION, Kings Park School District No. 5, County of Suffolk, WILLIAM JOHN BAKER, PHILIP J. BAKER and ST. JOSEPH'S ROMAN CATHOLIC CHURCH,

Respondents.

SUPPLEMENTARY APPENDIX TO WRIT OF CERTIORARI

JEFFREY H. JENNINGS
Counsel for Petitioner,
641 Meadow Road
Smithtown, N.Y. 11787
(516) 269-4083

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 11, 1981

HON. GUY J. MANGANO, Justice Presiding,
HON. SAMUEL RABIN,
HON. CHARLES MARGETT,
HON. MOSES M. WEINSTEIN,
Associate Justices

Katherine Savastano, administratrix, etc.,

Appellant,

v.

Board of Education, Kings Park School District No. 5 County of Suffolk, et al.,

Respondents,

et al.,

Defendants.

ORDER ON APPEAL FROM ORDER

In the above entitled cause, the above named Katherine Savastano, administratrix etc., plaintiff, having appealed to this court from an order of the Supreme Court, Suffolk County, dated March 25, 1980; and the said appeal having been argued by Jeffrey H. Jennings, Esq., of counsel for the appellant, and submitted by Thomas A. Palmer, Esq., of counsel for respondent Board of Education and submitted by Seymour H. Metnick, Esq. of counsel for the respondent, and

due deliberation having been had thereon; and upon this court's of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed, without costs or disbursements.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

ORDER GRANTING SUMMARY JUDGMENT

At a Special Term Part I, of the Supreme Court of the State of New York, held in and for the County of Suffolk, at Griffing Avenue, Riverhead, New York, on the 25th day of March 1980

PRESENT:

HON. JOHN J.J. JONES
Justice

---X

KATHERINE SAVASTANO, Administratrix of the estate of WILLIAM SAVASTANO, deceased,

Plaintiff,

—against—

BOARD OF EDUCATION, Kings Park School District No. 5, County of Suffolk, WILLIAM JOHN BAKER, PHILIP J. BAKER and ST. JOSEPH'S ROMAN CATHOLIC CHURCH,

Defendants.

---X

ORDER GRANTING SUMMARY JUDGMENT

Index No. 77-2601

Enter: March 31, 1980 @ 2:24 P.M.

The defendant, BOARD OF EDUCATION, Kings Park School District No. 5, County of Suffolk, by its attorney, J. ROBERT MORRIS, ESQ., THOMAS A. PALMER, ESQ., of counsel, having duly moved for an Order pursuant to C.P.L.R. 3212 and the defendant, S. JOSEPH'S ROMAN CATHOLIC CHURCH, by its attorneys, SUTERA, METNICK & SUTERA, ESQS. having duly cross-moved pursuant to C.P.L.R. 3212, for an Order dismissing the complaint in the above entitled action and directing that summary judgment be entered in their favor and against the plaintiff, upon the ground that the cause of action has no merit and said Motion having regularly come on to be heard, and the Court having rendered a Memorandum Decision, dated December 31, 1979,

NOW, upon reading and filing the Notice of Motion, dated November 17, 1978, the Affidavit of THOMAS A. PALMER, ESQ., sworn to on the 20th day of November, 1978, the Notice of Cross Motion, dated November 22, 1978, the Affirmation of Seymour H. Metnick, Esq., dated November 22, 1978, the Summons, Complaint and Answers heretofore served herein, the affidavits of Frank S. Child, M.D., sworn to the 12th day of December, 1955 and the 27th day of February, 1956, the Affidavit of Alphonse Savastano, sworn to the 24th day of February, 1956 and the Affidavit of Sidney R. Siben, Esq., sworn to the 24th day of February, 1956, attached to each motion paper in support of said Motion, and upon the Affidavit of Laura Reisinger, sworn to the 18th day of December,

1978, the Affidavit of Margaret Savastano, sworn to the 20th day of February, 1978, the Affidavit of Mary Catherine Tyson, M.D., sworn to the 1st day of May, 1978, the Affidavit of William J. Sharkey, sworn to the 16th day of December, 1978, the Affirmation of Jeffrey H. Jennings, Esq., dated the 2nd day of December, 1978 and the exhibits attached thereto, all in opposition thereto, and after due deliberation having been held thereon,

NOW, on the Motion of J. ROBERT MORRIS, ESQ., by THOMAS A. PALMER, ESQ., of counsel, attorneys for defendant, BOARD OF EDUCATION, Kings Park School District No. 5, County of Suffolk, and SUTERA, METNICK & SUTERA, ESQS., attorneys for defendant, ST. JOSEPH'S ROMAN CATHOLIC CHURCH, it is

ORDERED, that the Motion be and the same is hereby in all respects granted, and that the Complaint herein be and the same is dismissed, and it is further

ORDERED, that the Judgment be entered herein by the Clerk of the this Court, in favor of the defendants, BOARD OF EDUCATION, Kings Park School District No. 5, and ST. JOSEPH'S ROMAN CATHOLIC CHURCH, against the plaintiff, KATHERINE SAVASTANO, Administratrix of the Estate of WILLIAM SAVASTANO, deceased, without costs, interest or disbursements.

ENTER
JOHN J.J. JONES
J.S.C.

GRANTED
March 25, 1980
ARTHUR J. FELICE
Clerk of Suffolk County

OPINION IN COURT BELOW

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM PART I
Index No. 77-2601
By: Jones, J.S.C.
Motion #2,600

Dated: December 31, 1979

J. ROBERT MORRIS, ESQ.,
Atty. for Deft., BD. OF EDUCATION
JAMES A. PALMER, ESQ., Of Counsel
Main Street
Amagansett, N.Y. 11930

SUTERA, METNICK, SUTERA, P.C.
Atty. for Deft: ST. JOSEPH'S
299 Broadway
New York, N.Y. 10007

JEFFREY H. JENNINGS, ESQ.,
Attys. for the Plaintiff
146 Rider Avenue
Patchogue, N.Y. 11772

KATHERINE SAVASTANO, Administratrix of the Estate of WILLIAM SAVASTANO, Deceased

vs.

BOARD OF EDUCATION, Kings Park School District No. 5, County of Suffolk, WILLIAM JOHN BAKER, PHILIP J. BAKER and ST. JOSEPH'S ROMAN CATHOLIC CHURCH,

Defendants.

This is a motion by the defendant, BOARD OF EDUCATION and a cross-motion by ST. JOSEPH'S ROMAN CATHOLIC CHURCH for summary judgment under CPLR 3212 on the grounds that an infant's compromise and general release bars the action and that, in any event, the action is time barred by passage of the statute of limitations. (CPLR 3211 (a) 5).

On February 2nd, 1955, the decedent, then five and one half years of age, was injured while attending ST. JOSEPH'S SCHOOL by a bus owned and operated by the defendant, school board, suffering considerable severe permanently disabling injuries some of which left him paralyzed from the waist down. A law suit was commenced against defendants based on these personal injuries which was settled on May 16, 1956 in the sum of $75,000.00 by compromise the parties before Justice Ritchie, Supreme Court, Suffolk County, who approved the settlement by appropriate order dated March 10, 1958.

On August 20, 1970, shortly after WILLIAM SAVASTANO reached the age of majority he withdrew the full balance of the settlement funds from the banks in which they had been deposited pursuant to the original order of the court (J. GEILER). The decedent married plaintiff September 16, 1970 and on April 26th, 1974, he died of a rupture of the thoracic aorta.

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM
PART I
Index No. 77-2601

By JONES, J.S.C.
MOTION #2,600

Dated: December 31, 1979

On April 25, 1975, this action was commenced which seeks to vacate the prior compromise settlement on the grounds that it was entered into under a mutual mistake of facts and to recover for the injuries suffered by decedent and his spouse for his wrongful death.

In order to succeed in vacating the judicial order of settlement and release and setting aside the settlement agreement voluntarily entered into by the parties the burden is on plaintiff to establish that there was a mutual mistake of the parties as to the existence and consequences of unknown injuries and on that basis the settlement as agreed to did not represent the true intent of the parties (*MANGINI v. MC CLURG*, 24 NY 2d 556).

At the time the original infant's compromise was before the court, the record included the medical diagnosis and prognosis as contained in two affidavits of Dr. Frank S. Child, M.D., an orthopedic surgeon, dated respectively December 17, 1955 and February 27, 1956. Based on this extensive medical data which supports defendants motion for summary judgment and in the absence of any medical evidence to the contrary by plaintiff the court concludes that there is no basis on which to ground plaintiffs' contention of mutual mistake. (*COLONEL v. TAR GEE CONTRACTING CO.*, 65 AD 2d 720). Here all decedents injuries were known by the parties and the court at the time of the settlement and it is only the potential[1] sequelae of these injuries on which plaintiff relies and this is not a basis before the court to rescind the settlement (*MANGINI v. MC CLURG*, Supra).

Additionally, the record before the court at the time the infant's compromise as accepted by Justice Ritchie reflects that there were serious questions of liability which may have precluded recovery at trial. These considerations are reflected in the affidavit of counsel and the very manner in which the accident occurred.

Doubtful liability is a proper consideration in the compromise of an infant's action and where, as here, such a factor is present it precludes a finding of mutual mistake as to the extent of the injuries known or unknown.

The court of appeals in *MANGINI v. MCCLURG*, 24 NY 2d 556, considered this very issue and concluded at pg. 566:

...There are many reasons, including doubtful

[1]Further, there is no medical evidence presented here by plaintiff which would be a basis to conclude that the cause of death was in any way related to the original injuries.

> liability, the willingness to take a calculated risk, the desire to obtain an earlier rather than a later settlement, and perhaps why realeasors may wish to effect a settlement and intend to give the releasee a discharge of liability for any unknown injuries - in short to bargain for general peace. When general peace is the consideration there can be no mutual mistake as to the extent of the injuries, known or unknown.

The court also notes that notwithstanding this adverse determination, the plaintiff is also barred from pursuing this action by the statute of limitations.

The statute of limitations which applied to this cause of action as of August 3, 1970 when the decedent reached his majority was extended three years from that date and expired prior to his death.[2] (CPLR 208, CPLR 214 (6)).

Under the circumstances, the court concludes that defendants have established that summary disposition of this action is appropriate under CPLR 3212 and the court grants judgment in favor of defendants.

Settle judgment.

JOHN J.J. JONES, J.S.C.

[2]The two major exceptions to the running of the medical malpractice statute of limitations based on the finding of a "foreign object" (*FLANAGAN v. MOUNT EDEN GENERAL HOSPITAL*, 24 NY 2d 427) or based on a course of "continuous treatment" (*DAVIS v. CITY OF NEW YORK*, 38 NY 2d 257) are inapplicable to this action.

Opposition

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No. ———

IN THE

Supreme Court of the United States

October Term, 1981

KATHERINE SAVASTANO, Administratrix of the Estate of WILLIAM SAVASTANO, Deceased,
Petitioner,

against

BOARD OF EDUCATION, Kings Park School District No. 5, County of Suffolk, WILLIAM JOHN BAKER, PHILIP J. BAKER and ST. JOSEPH'S ROMAN CATHOLIC CHURCH,
Respondents.

Brief of Respondent St. Joseph's Roman Catholic Church in Opposition to Petition for Writ of Certiorari from the Court of Appeals, State of New York

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SEYMOUR H. METNICK
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

KATHERINE SAVASTANO, Administratrix of the Estate of William Savastano, Deceased,

Petitioner,

against

BOARD OF EDUCATION, Kings Park School District No. 5, County of Suffolk, WILLIAM JOHN BAKER, PHILIP J. BAKER and ST. JOSEPH'S ROMAN CATHOLIC CHURCH,

Respondents.

Brief of Respondent St. Joseph's Roman Catholic Church in Opposition to Petition for Writ of Certiorari From the Court of Appeals, State of New York.

Statement of the Case.

In 1955, when plaintiff's intestate was five years old, he sustained crippling injuries due to an automobile accident. The resulting lawsuit in the New York State Courts brought on the infant's behalf was settled for $75,000 in March, 1958. At the time of the infant's compromise settlement, affidavits submitted from the infant plaintiff's

treating physician upon which the compromise order was based clearly stated that "* * * the infant plaintiff has a permanent disability of paralysis of both lower extremities * * *" and "in your deponent's opinion all of the above are permanent in nature and character and the infant plaintiff will be a permanent paralytic for the rest of his life."

The plaintiff's intestate was born on August 3, 1949. He become 21 years of age on August 3, 1970. On August 2, 1971, plaintiff's intestate commenced an action in the United States District Court, Eastern District of New York, to disclaim the aforesaid settlement. The action was based on a violation of the 5th and 14th amendments to the United States Constitution.

The Federal Court action was dismissed for failure to state a cause of action under Federal rules, by order of the Hon. Jack B. Weinstein dated June 12, 1973, and entered on June 19, 1973, a copy of which is annexed hereto.

Plaintiff's intestate died on April 26, 1974, allegedly as a result of the paralysis sustained in the 1955 accident.

On April 25, 1975, plaintiff instituted the instant action to set aside the release entered into in 1958, claiming that the full import of the injuries sustained by plaintiff's intestate were not fully comprehended at the time of the infant's compromise settlement.

The Supreme Court of the State of New York, County of Suffolk, dismissed the action for failure to state a cause of action, by order of the Hon. John J. J. Jones, dated March 25, 1980, and entered on March 31, 1980.

By order dated May 11, 1981, the Appellate Division of the Supreme Court of the State of New York, Second

Judicial Department, unanimously affirmed the lower Court's order. By order dated December 17, 1981, the Court of Appeals of the State of New York denied plaintiff-appellant's motion for leave to appeal to the Court of Appeals.

Summary of Argument.

1. When an injury is known, and the mistake is merely as to the consequence, future course or sequelae of a known injury, then the release is valid and enforceable.

2. Petitioner was barred from pursuing this action in the New York State Courts by the Statute of Limitations.

3. No Federal question exists.

ARGUMENT.

POINT I.

There was no mutual mistake of the parties as to petitioner's decedent's injuries at the time of the infant's compromise settlement.

Petitioner's complaint alleges that,

> "The said settlement effectuated was made on a mutual mistake of fact as to the physical condition of plaintiff's intestate that he was able to get about and his was a stable disability and not fatally deteriorating."

Petitioner's bill of particulars contends as follows:

> "4. Hit on back paralyzed plaintiff's intestate and led to progressive languishment, amputations and death."

Thus, it is very clear that petitioner contended in the New York State Courts that the death to petitioner's intestate resulted from his paralysis. However, the paralysis was a known and existing injury at the time of the infant's compromise, settlement and release. The alleged mistake or miscalculations as to the consequence is not a ground for setting aside the release under New York State law.

The Court of Appeals of the State of New York in *Mangini v. McClurg,* 24 N. Y. 2d 565, 301 N. Y. S. 2d 508 (1969), is the definitive exposition of the law of the State of New York applicable to this case. In the *Mangini* case, the Court of Appeals stated:

> "Moreover, in this development in the law in resolving claims of mutual mistake as to injury at the time of release, there has been delineated a sharp distinction between injuries unknown to the parties and mistake as to the consequence of a known injury. A mistaken belief as to the nonexistence of presently existing injury is prerequisite to avoidance of a release (*Brown v. Manshul Realty Corp.*, 271 App. Div. 222, 63 N. Y. S. 2d 1, affd. 299 N. Y. 618, 86 N. E. 2d 179). If the injury is known, and the mistake, it has been said, is merely as to the consequence, future course, or sequelae of a known injury, then the release will stand (*Flandorfer v. Wilford,* 25 A. D. 2d 751, 269 N. Y. S. 2d 159; *Perry v. Kingston City Trans. Corp.*, 19 A. D. 2d 202, 241 N. Y. S. 2d 579; *Acevedo v. City of New York,* 15 A. D. 2d 899, 225 N. Y. S. 2d 584, affd. 17 N. Y. 2d 843, 271 N. Y. S. 2d 281, 218 N. E. 2d 449; *Mack v. Albee Press,* 263 App. Div. 275, 32 N. Y. S. 2d 231, affd. 288 N. Y. 623, 42 N. E. 2d 617; 49 N. Y. Jur., Release and Discharge, Sec. 19, pp. 358-359)."

It is not in dispute that the paralysis was well known to all parties when the settlement was consummated. Under these circumstances, New York law as stated in the *Mangini* case requires that the release stand.

The New York Court of Appeals in the *Mangini* case also pointed out an additional reason why the release cannot be voided. At page 566, the following language appears:

> "As already observed, there are many reasons, including doubtful liability, the willingness to take a calculated risk, the desire to obtain an earlier rather than a later settlement and perhaps others, why releasors may wish to affect a settlement and intend to give the releasee a discharge of liability for any unknown injuries—in short to bargain for general peace. When general peace is the consideration there can be no mutual mistake as to the extent of the injuries, known or unknown."

It is quite clear that in the instant matter, there was doubtful liability which motivated the acceptance of settlement. The infant's father, Alphonse Savastano, in his affidavit dated February 24, 1956, and the affidavit of Sidney R. Siben, Esq., guardian ad litem and counsel for the infant plaintiff, sworn to the 24th day of February, 1956, clearly and unequivocally indicate that doubtful liability was one of the motivating factors in the acceptance of the settlement. The following language is contained in the affidavit of Sidney R. Siben, Esq.:

> "The defendants denied any negligence on their part and have stated that the accident was due in its entirety to the negligence and carelessness on the part of the infant plaintiff who ran into the rear wheel or was shoved into the rear wheel of the bus

while it was being operated at the rate of approximately 2 to 5 miles per hour.

Because of the serious nature of the injuries sustained by the infant plaintiff and the nature of the liability in the case, which would make it very hazardous to try this case, your deponent has counselled the acceptance of a total settlement in the sum of $75,000.00 to be paid equally by the defendants herein."

As the New York Court of Appeals stated in *Mangini*, "when general peace is the consideration, there can be no mutual mistake as to the extent of the injuries, known or unknown."

POINT II.

Petitioner is barred from pursuing this action by the Statute of Limitations.

Petitioner's intestate was born on August 3, 1949. The accident, which is the accrual date for any action herein, occurred on February 21, 1955. The decedent became 21 years of age on August 3, 1970. He died on April 26, 1974.

New York law (McKinney's CPLR §208) provided that decedent's period of disability ceased, for instituting an action, on his 21st birthday. CPLR 214(5) gave decedent 3 years from the date his disability ceased within which to timely commence an action. He had, therefore, until August 3, 1973, to institute an action.

Decedent did commence an action in the United States District Court, Eastern District of New York, on August 2, 1971. This action was dismissed for failure to state a cause of action by order of the Court entered on June 19, 1973.

New York law (CPLR §205[a]) permitted the decedent to commence a new action upon the same cause of action, within six months of a termination, other than on the merits or voluntarily discontinuance.

Thus, the decedent had six months from June 19, 1973, or until December 19, 1973, pursuant to the saving grace of CPLR §205 within which to commence the within action. This action, instituted on April 25, 1975, is thus barred by the Statute of Limitations.

POINT III.

Petitioner has not raised any Federal constitutional issue of substance.

Petitioner contends that petitioner's decedent was deprived of due process of law and the assistance of counsel in violation of Amendments V and VI of the United States Constitution.

It should be noted that petitioner's counsel has not stated in what manner the New York Court's application of the substantive civil common law of the State of New York has deprived the petitioner of due process.

Petitioner's reliance upon Amendment VI of the U. S. Constitution is obviously misplaced. Said amendment guarantees an accused in a criminal prosecution the right to effective assistance of counsel for his defense. It has no application to a plaintiff in a civil action, who has no Constitutional right to counsel, effective or otherwise. Assuming *arguendo,* that petitioner's decedent had a Constitutional right to effective assistance of counsel in his civil tort action, a proposition which we vigorously dispute, petitioner has failed to show how his decedent was deprived of same.

Counsel for petitioner's decedent obtained a $75,000 settlement for decedent in 1958. That settlement figure is roughly equivalent to a quarter of a million dollars in today's inflated dollars, which is of course, a very large sum of money. Moreover, petitioner's contention that decedent's attorney in 1958 represented 24% of all tort litigants in Suffolk County, New York (although petitioner fails to state how he derived this statistic), can only speak well of decedent's counsel's reputation as a top lawyer in his locale.

Of course, the number of clients an attorney represents has obsolutely no probative value as to whether an individual client receives effective assistance of counsel. Petitioner has simply completely failed to show in what manner decedent failed to receive effective assistance of counsel, or that the Constitution gives civil litigants the right to counsel.

CONCLUSION.

Certiorari should be denied.

Dated: March 26, 1982.

Respectfully submitted,

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SEYMOUR H. METNICK and
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Of Counsel

Appendix

Memorandum and Order of Jack B. Weinstein, U.S.D.J. dated June 12, 1973

(Filed—June 19, 1973)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM SAVASTANO,

Plaintiff,

—against—

BOARD OF EDUCATION, KINGS PARK SCHOOL, DISTRICT #5, COUNTY OF SUFFOLK; WILLIAM JOHN BAKER, PHILLIP J. BAKER, SAINT JOSEPH'S ROMAN CATHOLIC CHURCH, SIBEN & SIBEN, ALPHONSE SAVASTANO and THE PEOPLE OF THE STATE OF NEW YORK,

Defendants.

Appearances:

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J. Robert Morris, Esq.
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Attorney for Defendant Saint Joseph's Roman Catholic Church

Plaintiff brings this suit claiming violation of the 14th and 5th Amendments of the United States Constitution. At the time he was an infant of six he was involved in an accident. The suit was settled for $75,000 in 1958. He claims that there was a further deterioration of his physical condition and that the monies that should have been saved for him were improperly expended. He seeks to disclaim the settlement.

No federal constitutional issues of substance are raised and the motion to dismiss for failure to state a cause of action cognizable in this court must be granted. If there is any remedy for the plaintiff it is in the state court.

Complaint is dismissed.

So ordered.

Dated: Brooklyn, New York
June 12, 1973

JACK B. WEINSTEIN
U.S.D.J.